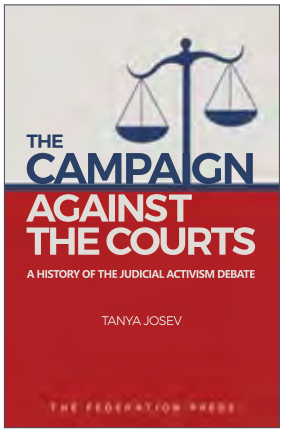
The Campaign Against The Courts: A History of Judicial Activism

By Tanya Josev | The Federation Press | 2017



I have to admit that the prospect of reading, let alone reviewing, *The Campaign against the Courts – A History of the Judicial Activism Debate* by Tanya Josev did not fill me with excitement and could not tear me away from supervising my children's viewing of Australian Ninja Warrior!

Once I started reading, however, I discovered not a 'great story [of] sex, race and power' as David Marr's review on the back cover promised, but a great story of the development of the term 'judicial activism' from its first use in the United States in the middle of the last century to its adoption in Australia in the early 1990s and continuing right up to the recent appointment of Justice Edelman to the High Court.

A work experience student recently asked me what the politics are of the various judges of the Supreme Court. I was surprised by this question, not least since it was one to which I had given little thought. Where those judges are required to follow precedent, they generally do so; and where there is an issue of discretion or an issue of law not yet determined by authority, a judge's decision may say something about his or her attitude in a particular area of law, but I had not perceived any underlying broad political approaches.

I added that it seemed to me that things might be different in the High Court, where the judges may decline to follow precedent and where they may be called upon in applying the Constitution to strike down legislation. In that context political leanings might be more apparent and it is this, as it seems to me, that is most likely to prompt accusations of 'judicial activism'.

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Although I was aware of the term 'judicial activism', I would not have been able to give it a precise meaning. Having read this hugely entertaining and informative book, I could still not do so (through no fault of the author), but I am better informed and I do now know why it is really not possible to do so. Indeed, it seems to me that although a definition could of course be ascribed to the term, the reality is that it is used to mean many different things, depending upon the particular commentator and the particular context, but none of which are intended as complimentary.

Josev describes how the term emerged in the United States in the middle of the last century as a recognition of the perceived countermajoritarian difficulty of unelected and unaccountable judges being able to thwart the will of the majority by striking down legislation duly enacted by the people's representatives. It remained dormant as a term in Australia, however, until the early 1990s following the decisions in *Mabo* (1992) and later *Wik* (1996).

As Josev notes, the criticism of those decisions on the basis that they demonstrated judicial activism was driven not by any analysis of the reasoning applied but rather simply by the commentator disagreeing with the result. Similar observations can be made about the criticisms of the High Court's development of the implied rights doctrine in cases such as *ACT v Commonwealth, Nationwide News Pty Ltd v Wills* and *Leeth v Commonwealth* (all 1992).

Jumping forward in time, reactions to recent appointments to the High Court indicate how the term has been deployed over the 25 or so years of its use in Australia. Thus the appointment of Justice Edelman was described in *The Australian* as a 'conservative political decision' likely to ensure the High Court has a 'backbone that resists judicial activism', while at the same time *The Telegraph* saw him as a judicial activist and his appointment as evidence that the Coalition 'just keeps failing to make a conservative stamp on our institutions, unlike Labor, which entrenches leftists any chance it gets'.

It can be seen then that judicial activist is a term that has been applied in particular by the right wing press to criticise particular decisions where conservative legislation has been struck down (e.g. *Williams v Commonwealth* (2012 and 2014) and *Plaintiff M70/2011 v Minister of Immigration* (2011)). Without any

Tanya Josev, 'The Campaign Against The Courts: A History of Judicial Activism.'

analysis of the judicial reasoning involved, however, it is difficult to see how the term when applied only to particular results can have any content or real meaning.

Other meanings that have been ascribed to the term judicial activism are similarly uninformative and unhelpful. According to some commentators, activist judges are those who make the law rather than apply the law, but judges are required every day to apply their discretion in many areas or to decide cases where there is no binding precedent. To attempt to determine whether that is making, deciding or applying the law is a pointless semantic debate.

To similar effect, the perjoriative use of the term 'elitist' when applied to the judiciary is no more than a recognition of their function and the countermajoritarian difficulty.

Others have used the term to suggest that some judges are driven to achieve a particular result without regard to previous authority. The common law, however, has always recognised the power of a court to depart from a previous decision if it is satisfied that it was wrong or, at least in the case of the High Court, should not be followed. Thus decisions as to gender and parenthood can be revisited to take into account changing social conditions and scientific developments, such as gender reassignment, gamete donors and adoption; and a doctrine that says that a woman cannot be raped by her husband can be abandoned.

Divergences have emerged between common law jurisdictions in relation to issues such as advocates' immunity and murder by joint enterprise, but it is difficult to see that any insight is gained from describing one jurisdiction as activist and the other as legalistic.

In her epilogue, Josev identifies eight separate meanings for judicial activism that have been used, each of which can be the subject of similar criticisms. Indeed the absence of any accepted or even commonly used definition demonstrates the real problem with its use. As such, judicial activism is a moveable term of abuse that is unhelpful and uninformative; it should be avoided in any legal or academic debate; and it is best left for use, if at all, in the media. Whatever position one takes, however, this excellent book provides ample ammunition for the reader to enter into the debate well-informed and ready for battle!

By Anthony Cheshire